the plaintiffs the sum of $1,778,795.79 being pro rata bonus, termination benefits, leave pay and indemnity in lieu of notice

In the ranking of certain debts to be paid out of the assets of the defendant company, the Companies Act 1965 is silent as to the position of the order made by the Commissioner for Labour. The question for determination here is whether the plaintiffs' claim ranks in priority over the debenture holders.

Under s 191 of the Companies Act 1965, it is provided that in the case where a receiver is appointed on behalf of the holders of any debenture of a company secured by a floating charge, debts which are preferential debts under s 292(3) or (5) in a winding up shall have priority over any claim for principal or interest in respect of the debentures and shall be paid out in the same priority as is prescribed in s 292(3) or (5) of the Companies Act 1965.

The plaintiffs' claim, in my view, falls under para (c) of s 292(1) of the Companies Act 1965. Under s 292(1)(c) of the Act, it is provided that all amounts due in respect of worker's compensation accrued before the commencement of the winding up shall be paid in priority to other unsecured debts. In relation to s 191 of the Act, such amount shall be paid in priority to debts to the debenture holders.

The question here is whether the termination benefits, pro rata bonus, leave pay and indemnity in lieu of notice are worker's compensation as provided under s 292(1)(c) of the Companies Act 1965.

The words used under para (c) of s 292(1) is general and capable of wide interpretation. It provides for 'worker's compensation under any written law relating to worker's compensation'. It does not refer to any particular Act. It does not for instance specifically refer to the Workmen's Compensation Act 1952. In my view, it leaves sufficient scope to include compensation under any other written law. In my view, compensation under s 69 of the Employment Act 1955 falls within the meaning of s 292(1)(c) of the Companies Act 1965.

For the reasons above, I would agree with the plaintiffs that the amount due to the plaintiffs from Indo Malaysia Engineering Co Bhd ranks prior to the debenture holders. I would therefore allow the plaintiffs' application as in prayer (a) with costs.

Application allowed.

Solicitors: *Murthi & Partners; Shearn Delamore & Co.*

Reported by *Zarinah Marican*

Hwang Chin Hor & Ors v Song Seng Sdn Bhd & Ors

HIGH COURT (IPOH) — COMPANIES WINDING UP NO 42-62-88
ABDUL MALEK J
27 DECEMBER 1989

Companies and Corporations — Winding up — Allegations of mismanagement of financial affairs of company — Appointment of interim receivers and managers sought — Principles applicable

The petitioners had commenced winding-up proceedings against the fifth respondent which was a company and applied for an order that interim receivers and managers be appointed in respect of the company until the hearing of the petition. It was contended for some of the petitioners that the immediate and pressing problem facing the company was that its funds were being siphoned off by the third and fourth respondents who were the executive deputy chairman and the finance director respectively of the company for the benefit of the first and second respondents which were companies of which they were also the executive directors. It was contended that a financial conflict of interest had arisen thereby and as a result the company's assets were in jeopardy. There was also an issue regarding the sums of $2,184,501 and $783,214 owing by the second respondent to the company. It was alleged by one of the petitioners that the company was unlikely to take steps to recover the sum of $2,184,501 as the board of directors of the company was dominated and controlled by the first, second, third and fourth respondents. The petitioners alleged that the third and fourth respondents would accelerate the depletion of the assets of the company pending the hearing of the petition.

Held, allowing the petitioners' application:

(1) Before the court can make an order for the appointment of an interim receiver, it must be satisfied that the plaintiff has established a good prima facie claim to title, that the property was in jeopardy, and, at the very least, that the party applying would be in a worse situation if the appointment of the receiver was delayed. These three factors were present in the instant case.

(2) There was no reason for the respondents to be upset by the appointment of the interim receivers and managers who would only be there temporarily until the hearing of the petition to oversee the financial dealings of the company as a neutral third party.

[*Editorial Note*: The respondents' appeal to the Supreme Court vide Civil Appeal No 02-479 of 1989 was heard on 6 March 1990 and the court, comprising Hashim Yeop A Sani CJ (Malaya), Gunn Chit Tuan and Ajaib Singh SCJJ, dismissed the appeal.]

Cases referred to

1 *Federal Transport Service Co Ltd & Ors* v *Abdul Malik & Ors* [1973] 1 MLJ 216 (refd)
2 *Setapak Tin Syndicate Ltd & Anor* v *Choo Kim Peng* [1947] MLJ 174 (folld)

WSW Davidson (*Choo Cheng Lee* (*Miss*) with him) for the first to the fifth petitioners.
Chan Kok Keong for the sixth to the twenty-sixth petitioners.
Porres P Royan for the respondents.

Cur Adv Vult

Abdul Malek J: By a summons-in-chambers (hereinafter 'the first summons-in-chambers') filed on 23 September 1989 upon a certificate of urgency, the sixth to the twenty-sixth petitioners, having given notice of intention to appear on the petition to support the petition of the first to the fifth petitioners, had applied for an order that Robert Lim Git Hooi and Ali bin Tan Sri Abdul Kadir of Arthur Young Public Accountants of No 35 Jalan Hussein, 30250 Ipoh be appointed as provisional liquidators or interim receivers and managers of the fifth respondent (hereinafter 'the company') until the making of the winding-up order or until further order and that the provisional liquidators or interim receivers and managers be at liberty to apply to the court for further directions as and when necessary. The duties to be performed by the provisional liquidators or interim receivers and managers as stated by the sixth to the twenty-sixth petitioners are:

(1) to enter into the premises and take over the running of the day to day business;
(2) to investigate the $2,184,501 due to the company from the second respondent and to take steps to recover the said moneys;
(3) to investigate the propriety of commissions paid to the second respondent;
(4) to evaluate the commercial justification of transactions between the second respondent and the company;
(5) to recover all debts, if any, due to the company from the second respondent; and
(6) to take possession of all assets immovable or movable belonging to the company.

During the submissions, both counsel for the petitioners agreed that they only wanted interim receivers and managers, and not provisional liquidators, to oversee things until the hearing of the petition.

On the date of hearing, learned counsel for the supporting sixth to the twenty-sixth petitioners admitted his misapprehension over the procedure adopted and informed the court that the correct course of action was to add on the supporting petitioners as petitioners first before the application could be considered. He had accordingly filed another summons-in-chambers (hereinafter 'the second summons-in-chambers') for this purpose on November 1989 and with the consent of learned counsel for the first to the fifth petitioners and learned counsel for the respondents, I had allowed the second summon-in-chambers subject to a proper refiling of the first summons-in-chambers with all the twenty-six petitioners named. I had immediately proceeded with the hearing of the first summons-in-chambers.

For the first summons-in-chambers, learned counsel for the sixth to the twenty-sixth petitioners relied on their supporting affidavit deposed by the sixth petitioner wherein he had stated that the immediate and pressing problem facing the company was that its funds were being siphoned off by the third (the executive deputy chairman of the company) and the fourth (the finance director of the company) respondents for the benefit of the first and second respondents of which they were also the executive directors. It was this financial conflict of interest that had worried the petitioners as the company's assets were in jeopardy.

The sixth petitioner had also deposed to one instance where he had queried the board of directors of the company at its annual general meeting on 18 July 1989 as to the identity of a 'related company' from which $2,184,501 was due as stated at p 7 of the accounts marked 'HCH-4' at encl 28. The answer was that the related company was the second respondent. The sixth petitioner was of the view that as the first to the fourth respondents were dominating and controlling the board of directors, it was unlikely that any steps would be taken to recover this sum to the detriment of the minority shareholders of 700,000 shares like the petitioners. There was also another entry of a $783,214 commission due from the same related company. The petitioners were also worried that the third and fourth respondents would now, pending the hearing of the petition, accelerate their task of depleting the assets of the company as the granting of the petition would put an end to their systematic plundering of the company's assets.

Learned counsel for the first to the fifth petitioners submitted that the accounts exhibited showed that the money coming in to the company was going to the second respondent and that there was a continually increasing indebtedness of the second respondent to the company as the figures had showed a sum of $1.863m on 30 September 1988, $2.184m on 31 January 1989 and $2.7m on the date of the hearing. The second factor was the high commissions that were being paid to the second respondent at $496,572 on 30 September 1988 and $783,214 on the 31 January 1989. To top it all, learned counsel had added, the first respondent was an exempt company and did not produce accounts and the second respondent had no cash in the company. No evidence had also been adduced as to the necessity of paying the money to the second respondent if they were only agents of the company, especially if they were keeping the commissions.

Learned counsel for the respondents clarified that the payments to the second respondent were for the services rendered and that the commissions were paid by the board of directors. He had also explained that the money had been kept with the second respondent because there was a credit limit of two months and that money was never remitted on the day the products were sold. He added that the company was now a viable going concern making profits and since the allegations had been explained, there was no basis for receivers to be appointed.

Having perused the affidavits, I was inclined to agree with the contention of learned counsel for the first to the fifth petitioners that the view of the sixth to the twenty-sixth petitioners, being unbiased parties not involved in any power struggle in the company and holding a substantial number of shares, should be respected as they were only concerned with the continued profitability of the company and were anxious as to the fact of the assets of the company being in jeopardy. They were not asking for liquidation but only for an order that interim receivers and managers, not provisional liquidators, be appointed pending the hearing of the petition to avoid a further worsening of the company's financial situation as seen from the accounts by the continued and increasing depletion of the company's funds to the second respondent. In the light of the affidavits and the submissions and the explanation of the respondents, I had also come to the conclusion that the petitioners had a valid reason to worry.

In *Federal Transport Service Co Ltd & Ors* v *Abdul Malik & Ors*,[1] the court made an interim order for the appointment of a receiver and manager until the company's affairs were sorted out as there were serious disputes among the shareholders and as the assets were in jeopardy. The case of *Setapak Tin Syndicate Ltd & Anor* v *Choo Kim Peng*[2] had ruled that before a court can make an order for the appointment of an (interim) receiver, it must be satisfied that the plaintiff had established a good prima facie claim to title, that the property was in jeopardy and, at the very least, that the party applying would be in a worse situation if the appointment of the receiver was delayed. My considered opinion was that these three factors were present in our instant case.

It is pertinent to refer to an earlier application by the first to the fifth petitioners, which was filed on November 1988, for an order that the first and second respondents be restrained whether directly or through any subsidiary or associated company from opening further letters of credit in their own names in respect of moneys receivable by the company or from paying into their own bank accounts such moneys until further order; that the third and/or fourth respondents be restrained whether by themselves or by their servants or agents or otherwise from causing further letters of credit to be opened in the names of the first and/or second respondents in respect of moneys receivable by the company or from causing further such moneys to be paid into the bank accounts of the first and/or second respondents until further order; costs and for such further or other relief. I had on March 1989 dismissed that application and now reproduce my ruling for ease of reference:

(1) the petitioners as minority shareholders of the fifth respondent (the company) are applying for an order restraining the first and second respondents directly or through any subsidiary company from opening further letters of credit in their own names in respect of moneys receivable by the said company or from paying into their own bank accounts such moneys until further order;

(2) they are also applying for an order restraining the third and fourth respondents by themselves or their servants or agents from causing further letters of credit to be opened in the names of the first and second respondents in respect of moneys receivable by the said company or from causing further such moneys to be paid into the bank accounts of the first and second respondents until further order and costs and other relief;

(3) counsel for the petitioners had submitted that the conduct of the third and fourth respondents in opening letters of credit for overseas buyers in the name of the second respondent and not the company in excess of $1m had jeopardized the position of the first petitioner who is guarantor for the fifth respondent (the company) for $4.5m;

(4) they are therefore asking for these orders as the company winding-up petition is scheduled for hearing on 4 April 1989 (since postponed to 31 January 1990);

(5) counsel for the respondents had argued that the fifth respondent (the company) had, after the company faced a financial crisis, appointed the second respondent as their distributor and in view of the first petitioner's letter to the Hongkong and Shanghai Banking Corp in his capacity as managing director of the company on 9 July 1987 had appointed the first respondent as the main distributor for the company's products in the local and overseas markets;

(6) the first petitioner had in his affidavit-in-reply clarified that this was done at the request of the third respondent;

(7) having considered the facts of the matter, the arguments put forward, the affidavits averred and the authorities cited, the court is of the view that in the circumstances the balance of convenience lies in not granting the injunction asked for so that the parties remain at status quo until the hearing of the petition;

(8) in the event, the application is dismissed with costs.

To my mind, the present application is somewhat different in effect as all that the petitioners are asking for is for interim receivers and managers to be appointed until the hearing of the petition. The reasons are the same as for the earlier application but my view then was that the earlier injunction asked for was not an appropriate remedy on these facts and the position of the parties should remain at status quo pending the hearing of the petition. However, as stated earlier, I had concluded on the evidence available for this application that the petitioners had in fact made out a prima facie case, that the assets were in jeopardy and that the appointment of the interim receivers and managers would enable the present situation to be retained. The position of the parties, therefore, would remain unaffected by this order. In any case, I could see no reason for the respondents to be upset by the appointment of the interim receivers and managers who would only be there temporarily until the hearing of the petition to oversee the financial dealings of the company as a neutral third party.

Consequently, for these same reasons, I had disallowed the respondents' application for a stay of my order pending this appeal to the Supreme Court as to grant it would have meant not giving the said order at all.

Application allowed.

Solicitors: *Azman, Davidson & Co; Chan & Associates; Shook Lin & Bok.*

Reported by *PS Ranjan*

Re Yap Kim Kee & Sons Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING-UP PETITION NO D4-42-242 OF 1988
ZAKARIA YATIM J
20 NOVEMBER 1989

Companies and Corporations — Winding up — Company unable to pay its debts — Setting aside winding-up petition — Letter of demand — Deemed to be unable to pay its debts — Companies Act 1965, s 218(1)(e) & (2)

On 20 November 1985, the petitioning creditor commenced a civil action against Yap Kim Kee & Sons Sdn Bhd ('the company') and Yap Kim Kee to claim for a sum of $232,000 after they had failed to make payment pursuant to a letter of demand sent a day earlier. On an O 14 application, the petitioning creditor was granted liberty to enter judgment for $145,000 and $350 costs and the balance of the claim and interest to proceed to trial. Based on this judgment, the petitioning creditor filed a petition to wind up the company stating that a demand in writing dated 19 November 1985 for the payment of the said sum was sent to the company's registered office but no payment was made. Accordingly, the company is unable to pay its debts and it is just and equitable that the company be wound up. The company applied, inter alia, that the petition be set aside. The main issue is whether the company is deemed unable to pay its debts by virtue of s 218(2)(a) of the Companies Act 1965.

Held, allowing the company's application:

(1) Although the demand in writing need not be in special form, it must comply strictly with the requirements of s 218(2)(a).

(2) The demand must be made in writing and signed by the creditor or his authorized agent, and it must specify the sum due. The demand must be served at the registered office of the company. The normal practice is to state in the notice (a) that the company must pay the sum due within 21 days from the date of the service of the demand and (b) failing which the company will be deemed unable to pay its debts and action will be taken to wind up the company.

(3) The letter of demand was bad and the company cannot be presumed to be unable to pay its debts because (a) the letter of demand was sent to the company before the civil action on 20 November 1985, the amount of which was disputed; (b) the letter was not signed and it was not stated who the solicitors were who wrote the letter; (c) the letter demanded 'immediate repayment'; (d) the letter threatened to institute legal proceedings against the company and Yap Kim Kee, and not a winding up proceeding; and (e) the amount demanded was $232,000 which was greater than the amount stated in the petition.

(4) There is no direct evidence to show that the company is unable to pay its debts or that it is insolvent.

Cases referred to

1 *Bateman Television Ltd & Anor* v *Coleridge Finance Co Ltd* [1969] NZLR 794 (refd)
2 *Re Willes Trading* [1977-78] ACLC 434 (follid)
3 *WT Henley's Telegraph Works Co Ltd* v *Gorakhpur Electric Supply Co Ltd* AIR 1936 All 840 (refd)
4 *Re Bryant Investment Co Ltd* [1974] 1 WLR 826 (refd)

Legislation referred to

Companies Act 1965 ss 218(1)(e), (2)

Sukhdev Singh for the respondent company.
J Kannaperan for the petitioner.

Cur Adv Vult

Zakaria Yatim J: This is an application by a company known as Yap Kim Kee and Sons Sdn Bhd (hereinafter referred to as 'the company') for an order that (a) the petition to wind up the company filed on 20 May 1988 be set aside; and/or (b) that all further proceedings be stayed until the final determination of the company's application for further arguments and/or further appeal in respect of the matter in Civil Suit No C7521 of 1985. The applicant asks that the costs of the application be costs in the cause.

I shall first deal with prayer (a). In the petition, the petitioning creditor states that the company is indebted to the petitioning creditor in the sum of $145,000 together with costs of $350 based on a judgment obtained in the High Court. The petition also states that a demand in writing dated 19 November 1985 for the payment of the said sum was sent to the company's registered office but no payment was made by the company. According to the petition, the company is unable to pay its debt and it is just and equitable that the company be wound up.

In order to consider prayer (a), it is relevant to see the sequence of events in the civil suit from the time the letter of demand was sent to the company to the time the judgment creditor obtained judgment against the company. Before the writ was issued the petitioning creditor, who was the plaintiff in the civil suit, wrote a letter of demand dated 19 November 1985 to the company, which was then the first defendant, and one Yap Kim Kee, the second defendant in the civil suit. The letter of demand required the defendants to repay the plaintiff immediately a sum of $232,000, failing which the plaintiff would institute legal proceedings against the defendants.

On 20 November 1985, the plaintiff filed a writ of summons in the High Court at Kuala Lumpur. In the statement of claim, the plaintiff claimed the same amount as stated in the letter of demand, that is the sum of